(9)

No. 90-6616

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1991

JAMES R. STRINGER,

Petitioner,

v.

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE STATES OF TEXAS, ALABAMA, ARIZONA, CALIFORNIA, INDIANA, KENTUCKY, MISSOURI, MONTANA, NEVADA, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether the rule of *Maynard v. Cartwright*, 486 U.S. 356 (1988), is a "new rule" that cannot be applied retroactively in collateral review?

II. Whether *Clemons v. Mississippi*, 494 U.S. ___, 110 S. Ct. 1441 (1990), is a "new rule" that cannot be applied retroactively in collateral review?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the States of Texas, Alabama, Arizona, California, Indiana, Kentucky, Missouri,

Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, Virginia, and Wyoming, by the Attorney General of Texas, and file this Brief *Amicus Curiae* in Support of Respondent, Lee Roy Black, Commissioner, Mississippi Department of Corrections.[1]

INTEREST OF *AMICI*

Amici are States with an interest in the limited application of new constitutional rules in federal habeas review effected by the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and in the interests of federalism, comity, and finality from which the retroactivity doctrine derives.

This brief is submitted by *amici* through their respective Attorneys General or Chief State Attorneys in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Stringer was indicted for and convicted of the capital offense of murder of Nell McWilliams during the course of an attempted robbery of her husband, Ray McWilliams. Stringer had previous business dealings with Ray McWilliams, who was in the business of buying and selling jewelry; McWilliams operated out of his home and kept large amounts of money in a safe. The trial evidence showed that Stringer initiated and orchestrated the offense: he laid detailed plans for the robbery, instructed the four other participants that the McWilliamses had to be killed because they knew him and could identify him, and furnished weapons for the participants. The plan included cutting the throats of Ray and Nell McWilliams, because Stringer was afraid

[1] For clarity, Petitioner will be referred to as "Stringer."

that the sound of gunshots would be heard by a police officer whose house was adjacent to the McWilliams home.

The crime did not go according to plan. Ray and Nell McWilliams were murdered in their home on June 21, 1982, but not by having their throats cut. The plan went awry when Ray McWilliams attempted to disarm Stringer, and Stringer's gun discharged during the ensuing scuffle. Accomplice John Mack Parker then placed his gun to Ray McWilliams' head and fired. Stringer's son and accomplice, James Stringer, put the end of a "riot" gun--the equivalent of a sawed-off shotgun--to the back of Nell McWilliams' head and shot her as she crawled on the floor. *Stringer v. State*, 454 So.2d 468, 471-72 (Miss. 1984).

At the punishment phase of Stringer's trial, the jury returned a sentence of death after finding three aggravating circumstances: (1) "[t]he Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit robbery; and was committed for pecuniary gain"; (2) "[t]he capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant"; and (3) "[t]he capital murder was especially heinous, atrocious or cruel."

Stringer directly appealed his conviction and sentence to the Mississippi Supreme Court and, concurrently, appealed the trial court's denial of a petition for writ of error coram nobis. The Mississippi Supreme Court affirmed on July 11, 1984, and on August 15, 1984, modified its opinion on denial of rehearing. *Stringer v. State*, 454 So.2d 468 (Miss. 1984). In affirming Stringer's death sentence, the

appellate court concluded that the sentence was not influenced by passion, prejudice, or any other arbitrary factor. *Id.* at 478.

Stringer's conviction became final on February 19, 1985, when this Court denied his petition for writ of certiorari. *Stringer v. Mississippi,* 469 U.S. 1230 (1985).

Following the denial of state collateral relief, *Stringer v. State,* 485 So.2d 274 (Miss.), *cert. denied,* 479 U.S. 922 (1986), Stringer initiated a federal habeas action in the United States District Court for the Southern District of Mississippi. The district court conducted an evidentiary hearing and on November 20, 1987, denied habeas corpus relief. *Stringer v. Scroggy,* 675 F.Supp. 356 (S.D. Miss. 1987). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the denial of habeas relief on December 22, 1988, *Stringer v. Jackson,* 862 F.2d 1108 (5th Cir. 1988), and denied rehearing on January 20, 1989.

Stringer petitioned for a writ of certiorari. On April 16, 1990, the Court granted certiorari, vacated the judgment, and remanded to the Fifth Circuit for further consideration in light of *Clemons v. Mississippi,* 494 U.S. ___, 110 S. Ct. 1441 (1990). The court of appeals issued its opinion on remand, holding that *Clemons* was a new rule that could not be retroactively applied on federal habeas review. *Stringer v. Black,* 909 F.2d 111 (5th Cir. 1990). This proceeding followed.

SUMMARY OF ARGUMENT

If *Maynard v. Cartwright*, 486 U.S. 356 (1988), or *Clemons v. Mississippi* actually stands for the proposition underlying Stringer's argument, that a death sentence violates the Eighth Amendment if an aggravating circumstance found by the jury is

invalidated for a reason other than constitutionally inadequate narrowing or injection of constitutionally impermissible sentencing concerns into the individualized determination of sentence, then either or both decisions represent "new rules" that cannot be applied retroactively on collateral review. *Zant v. Stephens*, 462 U.S. 862 (1983) and *Barclay v. Florida*, 463 U.S. 973 (1983), established that a valid death sentence results from a procedure that both genuinely narrows the class of persons eligible for the death penalty and provides for an individualized sentencing determination based on the defendant's character and the circumstances of the crime. Assuming *arguendo* that Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance is impermissibly vague, under *Stephens* and *Barclay*, the jury's finding of this factor does not implicate the Constitution if the class of persons eligible for the death sentence is otherwise genuinely narrowed at the guilt-innocence phase by the definition of capital murder or at the punishment phase by a constitutionally adequate circumstance. If the Court's reversal of the sentence in *Cartwright* is based on a rejection of this analysis rather than deference to Cartwright's possible right under state law to have his sentence modified to life, then *Cartwright* established a "new rule." Alternatively, if *Cartwright* did not reject the "harmless error" analysis of *Stephens* and *Barclay*, then, to the extent that the Court repudiated this analysis in *Clemons*, that decision sets forth a "new rule."

Moreover, the standards of appellate review set forth in *Clemons* were not dictated by *Lockett v. Ohio* , 438 U.S. 536 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Lockett* and *Eddings* were concerned with *what* mitigating evidence a jury must be permitted to consider not with *how* it should be considered. Mississippi's application of its automatic

affirmance rule to disregard the finding of the "especially heinous" circumstance, does not affect *what* mitigating evidence is considered in making the individualized assessment of sentence but *how* it is to be given effect--a concern that is not even within the logical compass of *Lockett* and *Eddings*.

ARGUMENT

With two limited exceptions, "new" rules of federal constitutional law cannot be applied on collateral review of a conviction that was final before the rule was announced. *Butler v. McKellar,* 494 U.S. ___, ___, 110 S. Ct. 1212, 1216 (1990); *Penry v. Lynaugh,* 492 U.S. 302, 313 (1989); *Teague v. Lane,* 489 U.S. at 310. A decision announces a new rule for retroactivity purposes if it "'breaks new ground,' 'imposes a new obligation on the States or Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Saffle v. Parks,* 494 U.S. ___, ___, 110 S. Ct. 1257, 1260 (1990), *quoting Teague v. Lane,* 489 U.S. at 301 (emphasis in original).

Non-retroactivity of new constitutional rules on collateral review reflects the nature, function, and scope of the writ and accommodates interests of comity and finality. *Teague v. Lane,* 489 U.S. at 305-08, *quoting Mackey v. United States,* 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ is available"); *see also Butler v. McKellar,* 494 U.S. at ___, 110 S. Ct. at 1216-17; *Saffle v. Parks,* 494 U.S. at ___, 110 S. Ct. at 1260. Thus, the question whether a decision announces a new rule is answered by reference to the purposes for which the habeas writ

is made available, the pre-eminent purpose being to ensure that state criminal proceedings are conducted in accordance with then-existing constitutional requirements. *Saffle v. Parks,* 494 U.S. at ___, 110 S. Ct. at 1260, *citing Butler v. McKellar,* 494 U.S. ___, 110 S. Ct. at 1216-17. Accordingly, to provide the incentive for trial and appellate judges to conduct their proceedings in accordance with established constitutional principles, habeas courts need only apply the constitutional standards that prevailed at the time of the original proceedings. *Teague v. Lane,* 489 U.S. at 306.

The principle that a new constitutional rule will not be applied on collateral review of convictions that became final before the rule was announced also reflects the State's interest in finality. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane,* 489 U.S. at 309.

For the purposes of the *Teague* retroactivity analysis, a rule sought by a petitioner is dictated by prior precedent if, at the time the petitioner's conviction became final, a state court would have felt *compelled* by existing precedent to conclude that the rule sought by petitioner was required by the Constitution. *Saffle v. Parks,* 494 U.S. at ___, 110 S. Ct. at 1260. The fact that the rule sought may be characterized as being informed by or within the logical compass of previously existing precedent, or even controlled or governed by prior decisions, does not mean that it was dictated or compelled by the pre-existing law and, thus, does not resolve the "new rule" inquiry. *Sawyer v. Smith,* 497 U.S. ___, ___, 110 S. Ct. 2822, 2828 (1990); *Butler v. McKellar,* 494 U.S. at ___, 110 S. Ct. at 1217. The "new rule" principle ensures

that "reasonable, good faith interpretations of existing precedents made by state courts" are validated, even though the interpretations ultimately conflict with later Supreme Court decisions. *Butler v. McKellar,* 494 U.S. at ___, 110 S. Ct. at 1217. Thus, habeas review is foreclosed not only when petitioner's claim clearly breaks new ground or imposes new obligations on state or federal courts, but also when the outcome of a claim is susceptible to debate among reasonable jurists, when the reasoning underlying existing precedent supports a different conclusion, or when existing precedent "indicates" that a different conclusion might be reached. *Id.* at ___, 110 S. Ct. at 1217-18.

Maynard v. Cartwright and *Clemons v. Mississippi* were not dictated by previously existing precedent. Indeed, the reasoning employed in both *Stephens* and *Barclay* reasonably supports conclusions that differ from those reached in *Cartwright* and *Clemons,* including the conclusion that, under the circumstances presented in *Clemons* and in this case, application of Mississippi's automatic affirmance rule is constitutional.

I.

THE COURT'S DECISION IN *MAYNARD V. CARTWRIGHT* WAS NOT DICTATED BY EXISTING PRECEDENT.

At the time *Cartwright* was announced, it had been established that, in order for a death sentence to be valid, it must result from a sentencing procedure that provides for both (1) a genuine narrowing of the class of persons eligible for the death penalty in a manner that reasonably justifies the imposition of the death sentence, *see Zant v. Stephens,* 462 U.S. at 877;

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), and (2) an individualized determination that death is the appropriate sentence in the particular case. *See Barclay v. Florida,* 463 U.S. at 958, *quoting Zant v. Stephens,* 462 U.S. at 879 ("what is important . . . is the individualized determination on the basis of the character of the individual and the circumstances of the crime"). Further, *Stephens* and *Barclay* established that the invalidation of a statutory aggravating circumstance upon which a death sentence rests does not necessarily render the sentence unconstitutional. Rather, the constitutionality of the resulting sentence depends on two interrelated factors: "the function of the jury's finding of an aggravating circumstance under [the state's] capital sentencing statute, and [ ] the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Zant v. Stephens,* 462 U.S. at 863; *Barclay v. Florida*, 463 U.S. at 951

Cartwright marks a significant departure from prior precedent if it actually stands for the proposition underlying Stringer's argument, that a death sentence can violate the Eighth Amendment if an aggravating factor found by the sentencer is invalidated for a reason other than constitutionally inadequate narrowing or injection into the individualized sentencing determination of constitutionally impermissible considerations. No previously existing precedent supports, much less dictates, this interpretation of *Cartwright. Amici* ask the Court to reaffirm its prior holdings and clarify that the Eighth Amendment is not implicated by the invalidation of an aggravating factor unless the reason for the invalidation is itself constitutional in nature--a complete absence of narrowing or the injection of unconstitutional factors into the sentencing process.

A. The constitutionally required narrowing function is accomplished by the finding of one aggravating circumstance.

The death sentence invalidated in *Godfrey v. Georgia,* 446 U.S. 420 (1980), was based on the jury's finding of a single aggravating factor--that the offense was outrageously or wantonly vile, horrible or inhuman. The Court held that, without a narrowing construction, the aggravating factor found by the jury did not satisfy the requirement that states "define crimes for which death may be imposed in a way that obviates 'standardless [sentencing] discretion.'" *Id.* at 428. The Court also noted that a person of ordinary sensibility could characterize almost every murder as "outrageously or wantonly vile, horrible or inhuman." *Id.* at 428-29. Because the factor could be fairly found to characterize most murders, it did not perform the function required by the Eighth Amendment of narrowing the class of people eligible for the death penalty. Consequently, Godfrey's sentence was held unconstitutional.

In *Stephens,* however, the Court held that the Georgia Supreme Court's invalidation of one of three statutory aggravating circumstances did not implicate the Eighth Amendment. The state court's reason for invalidating the factor was analogous to the rationale for this Court's holding in *Godfrey*--the factor did not provide a principled basis for distinguishing cases in which the death penalty may be imposed from cases in which it may not be imposed. *Zant v. Stephens*, 462 U.S. at 878 & n.16. Given the state court's holding, the Court held that the constitutionality of Stephens' death sentence depended "on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid." *Zant v. Stephens,* 462 U.S. at 863.

Under Georgia's capital sentencing scheme "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.* at 874. Although the challenged factor might not have been sufficient *by itself* to narrow the class of death-eligible defendants, this Court nonetheless held that Stephens' death sentence could stand, because the narrowing function was properly accomplished by the two remaining valid aggravating circumstances. Apart from narrowing, the challenged factor did not violate the Constitution because it merely authorized the jury to consider constitutionally permissible factors that were properly before it. *Id.* at 885. The Court cautioned, however, that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose a death penalty." *Id.* at 890.

The Court's possible limitation of the holding of *Stephens* cannot be interpreted to compel the conclusion reached in *Cartwright,* particularly when *Stephens* is read in conjunction with *Barclay v. Florida.* In *Barclay,* decided less than a month after *Stephens,* the Court addressed the effect of the jury's finding of a nonstatutory aggravating circumstance on the validity of a sentencing proceeding in which the jury was required to weigh statutory aggravating circumstances against mitigating circumstances but was not permitted to con-

sider non-statutory aggravating circumstances.[2] The Court noted that federal review of aggravating circumstances employed by a state to narrow the class of people eligible for the death penalty is limited to whether the circumstances "are so unprincipled or arbitrary as to somehow violate the United States Constitution." *Barclay v. Florida,* 463 U.S. at 947. The Court concluded that the trial court's determination that the defendant's criminal record constituted a non-statutory aggravating circumstance presented an issue of state law that did not implicate the adequacy of the constitutionally required narrowing, because it is constitutionally permissible for a state to make a defendant's criminal record an aggravating circumstance. *Barclay v. Florida,* 463 U.S. at 951 n.8.

The decisions preceding *Cartwright* do not support, much less compel, the conclusion that a jury's

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[2] As with the impermissibly vague aggravating circumstance in *Stephens,* whether the finding of a non-statutory aggravating circumstance required vacating the sentence depended upon the function of the aggravating circumstance under Florida law and on the reason why the circumstance was invalid. *Barclay v. Florida,* 463 U.S. at 951. The Court summarized the relevant aspects of Florida state law as follows:

> [T]he Florida statute, like the Georgia statute at issue in *Zant v. Stephens,* ... requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence that may be relevant to the proper sentence. Unlike the Georgia statute, however, Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit non-statutory aggravating circumstances to enter into this weighing process.

Barclay v. Florida, 463 U.S. at 954.

finding of a valid aggravating circumstance may be rendered insufficient to satisfy the narrowing requirement if the jury also found an invalid aggravating circumstance. *See Lowenfield v. Phelps*, 484 U.S. at 246 ("[t]he fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition [to the narrowing accomplished at the guilt-innocence phase] is not part of the constitutionally required narrowing process, and so the fact that the aggravating circumstances duplicated one of the elements of the crime does not make this sentence constitutionally infirm"). Moreover, it was by no means evident that the constitutional validity of the narrowing could be undermined by state procedures, or the lack thereof, for saving a death sentence when one of two or more aggravating circumstances is invalidated. Under both *Stephens* and *Barclay,* as long as one valid aggravating circumstance exists, it should make no difference to the adequacy of the narrowing whether an additional factor was invalidated as a matter of state or federal law. Because, as set forth below, the aggravating circumstance at issue in *Cartwright* and in this case injected no constitutionally impermissible concerns into the jury's sentencing considerations, the invalidation of a death sentence based on the jury's finding of that circumstance constitutes an unprecedented extension of Eighth Amendment protections that was not dictated by existing precedent.

B. *Barclay* and *Stephens* support the conclusion that, if the constitutionally required narrowing has been accomplished by a valid aggravating circumstance, the Eighth Amendment is not violated by the jury's consideration of non-statutory aggravating circumstances that encompass aspects of the defendant's character or background or the circumstances of the offense.

Under the reasoning of *Stephens* and *Barclay*, the Eighth Amendment is not violated by the jury's consideration, in making the individualized sentencing determination, of the nature of the offense via the "especially heinous, atrocious or cruel" circumstance. "Once the jury finds that the defendant falls within the legislatively defined category of people eligible for the death penalty, . . . the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Barclay v. Florida*, 463 U.S. at 950, 966-67, *citing California v. Ramos*, 463 U.S. 992, 1008 (1983). "[T]he Constitution does not require the jury to ignore other possible [non-statutory] aggravating factors in the process of selecting, from among that class [of persons eligible for the death penalty], those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. at 878; *Barclay v. Florida*, 463 U.S. at 957 (there is no constitutional defect in sentence based on both statutory and non-statutory aggravating circumstances).

When a "heinousness"-type aggravating factor is invalidated for a reason other than inadequate narrowing of the class of death-eligible persons, the circumstances of the crime remain as a constitutionally permissible non-statutory aggravating factor. Regardless whether sentencing discretion is channelled through weighing of aggravation and mitigation, consideration of a non-statutory aggravating factor can undermine the constitutionality of the individual sentencing determination only if it injects constitutionally prohibited concerns into the jury's deliberations.[3] In *Barclay*, the Court was called upon to address the issue that it expressly left open in *Stephens*, the constitutional significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the sentencer is instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose a death penalty. *See Zant v. Stephens*, 462 U.S. at 890. The Court held that the trial judge's consideration of Barclay's criminal record as a non-statutory "aggravating circumstance did not so infect[ ] the balancing process that it [was] constitutionally impermissible for the Florida Supreme Court to let the sentence stand," precisely because

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[3] Numerous courts have reasonably interpreted *Barclay* and *Zant* to mean that it is constitutionally permissible for the sentencer to consider information not directly relevant to statutory aggravating and mitigating circumstances, so long as the evidence is relevant to the defendant's character or to the circumstances of the offense. *E.g., People v. Rodriguez*, 794 P.2d 965, 986 (Colo. 1990); *State v. Wille*, 559 So.2d 1321, 1336 (La. 1990); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, 374 (1990); *State v. Rose*, 112 N.J. 454, 548 A.2d 1058, 1085 n.11 (1988); *Robins v. State*, 798 P.2d 558, 567 (Nev. 1990); *State v. Gardner*, 789 P.2d 273, 285 (Utah 1989); *Lesko v. Owens*, 881 F.2d 44, 59 (3rd Cir. 1989); *Harris v. Pulley*, 885 F.2d 1354, 1381 (9th Cir. 1988) (as amended on denial of rehearing and rehearing *en banc*); *Coleman v. Saffle*, 852 F.2d 1377, 1390 (10th Cir. 1989).

Barclay's criminal record was an aspect of his background that was properly before the trial judge and nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. *Barclay v. Florida,* 463 U.S. at 956-57.

Significantly, Barclay relied on *Godfrey* to challenge two other aggravating circumstances as impermissibly vague: (1) that in committing the murder, he "knowingly created a great risk to many persons," and (2) that the murder was committed to "hinder the lawful exercise of any governmental function or the enforcement of the laws." *Barclay v. Florida,* 463 U.S. at 947, 968-69. While the plurality dismissed these challenges with the conclusion that "[i]t was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case", *id.* at 947, the concurrence's rejection was more instructive.

> This evidence was properly before the advisory jury because it was admissible at the guilt phase of the proceeding. Thus, whether or not these particular aggravating circumstances have been narrowly defined by the Florida Supreme Court, this case--like *Zant v. Stephens*--involves challenged findings of "statutory aggravating circumstance[s] ... whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged.

Barclay v. Florida, 463 U.S. at 969 (concurring opinion), *citing Zant v. Stephens,* 462 U.S. at 887.

C. Regardless whether *Godfrey* "controlled" the disposition of *Cartwright,* it did not dictate the conclusion that the aggravating factor was unconstitutionally applied in Cartwright's case or that his death sentence violated the Eighth Amendment.

In *Maynard v. Cartwright,* 486 U.S. at 363, the Court approved the court of appeals' holding that *Godfrey controlled* resolution of a challenge to Oklahoma's "especially heinous, atrocious or cruel" aggravating factor. This statement is not dispositive of the retroactivity question presented in this case and cannot be interpreted to mean that *Godfrey* dictated the conclusion that the challenged aggravating circumstance was impermissibly vague. The Court had on several occasions been presented with the opportunity to apply the reasoning of *Godfrey* in reviewing the "especially heinous, atrocious or cruel" factor and had declined to do so. For example, in *Barclay,* without addressing whether the "especially heinous, atrocious or cruel" circumstance was sufficiently specific and unambiguous to accomplish the narrowing required by the Eighth Amendment, the Court concluded that the finding was not "so unprincipled or arbitrary as to somehow violate the United States Constitution." *Barclay v. Florida,* 463 U.S. at 947. The Court approved the finding of the circumstance despite the fact that the judge tailored his understanding of this circumstance to the facts of the case and took into account the racial motive for the murder committed by Barclay, which he compared to his experiences in the Army in World War II, when he saw Nazi concentration camps and their victims. *Barclay v. Florida,* 463 U.S. at 949-50. *Godfrey* was distinguished

on the facts of the crime. *Id.* at 947 n.5; *but see Eddings v. Oklahoma,* 455 U.S. at 109 n.4 (expressing doubt that finding that murder of a police officer in performance of duties is "heinous, atrocious, or cruel" conforms to degree of certainty required by *Godfrey*).

Moreover, *Godfrey* did not dictate the conclusion that Cartwright's death sentence was unconstitutional under the Eighth Amendment. In *Cartwright,* the Court was presented with an issue not raised by the facts in *Godfrey,* specifically whether a death sentence based on a jury's finding of two aggravating circumstances must be reversed when, although one aggravating circumstance is subsequently determined to be unconstitutionally vague, another is unchallenged and sufficient to place the defendant within the class of people eligible for the death penalty. *See Barclay v. Florida,* 463 U.S. at 947 n.5, 956 (*Godfrey* distinguished on the basis that in *Godfrey* the jury found only one, impermissibly vague, aggravating circumstance). The *Cartwright* Court's apparent resolution of that issue represents a divergence from the reasoning of *Stephens* and *Barclay* that the Eighth Amendment is not implicated by an invalid aggravating factor if the constitutionally required narrowing of the class of people eligible for the death penalty is otherwise accomplished by a valid aggravating factor and if the individualized sentencing determination is based on constitutionally permissible information that is properly before the jury. *Barclay v. Florida,* 463 U.S. at 956-57; *Zant v. Stephens,* 462 U.S. at 887; *see also California v. Ramos,* 463 U.S. at 1008 (1983). By extending Eighth Amendment protections beyond the heretofore mandated narrowing and individualized determination of sentence, the Court clearly announced a new rule. Thus, the statement in *Cartwright* that *Godfrey* controlled the resolution of the challenge to Oklahoma's "especially heinous, atrocious

or cruel" aggravating circumstance, does not signify that *Godfrey* dictated the ultimate disposition of Cartwright's challenge.

II.

NO SUPREME COURT PRECEDENT COMPELLED THE DECISION IN *CLEMONS V. MISSISSIPPI.*

In *Clemons*, the Court first set forth the permissible scope and standards of appellate review that a state could employ after an aggravating circumstance found and considered by the sentencer in making the individualized sentencing determination has been invalidated. Following *Clemons*, an appellate court may either (1) reweigh the remaining evidence or (2) conduct a harmless error analysis by determining beyond a reasonable doubt whether the sentence would have been the same if there had been no "especially heinous" instruction or if that circumstance had been properly limited in scope. *Clemons v. Mississippi*, 494 U.S. at ___, 110 S. Ct. at 1449-50.

The *Clemons* Court rejected Mississippi's application of its automatic affirmance rule, under which a death sentence would be sustained if, following the invalidation of an aggravating circumstance, there nonetheless remained one or more valid aggravating circumstances. *Clemons v. Mississippi*, 494 U.S. ___, 110 S. Ct. at 1450, *see also Parker v. Dugger*, ___ U.S. ___, 111 S. Ct. 731, 739 (1991). The standards of appellate review set forth in *Clemons* and the rejection of Mississippi's automatic affirmance rule under the facts of *Clemons* cannot reasonably be characterized as

having been foreshadowed, much less dictated, by existing precedent.[4]

The Court further diverged from the reasoning of *Barclay* and *Stephens* in rejecting Mississippi's application of its automatic affirmance rule under the facts presented by *Clemons* in which the only considerations injected into the jury's sentencing determination by the invalid aggravating circumstance were the facts and nature of the offense. As set forth *supra*, *Barclay* and *Stephens* reasonably support the conclusion that the constitutionality of the individualized sentencing determination is not undermined by the jury's consideration via an invalid aggravating factor of evidence relating to the defendant's character or background or the circumstances of the offense, if the constitutionally required narrowing is accomplished by a valid aggravating circumstance or by the definition of the capital offense.

More recently, in *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597 (1991), the Court reaffirmed the appropriateness of sentencer consideration of precisely the type of evidence that in *Clemons* was found to require resentencing. At issue in *Payne* was the appropriateness of jury consideration of "victim impact evidence" and argument relating to that evidence. The Court concluded "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." *Id*. at ___, 111 S. Ct. at 2605. "[I]t was never held or even suggested in any of our cases preceding *Booth* [*v. Maryland*, 482 U.S. 496 (1987)] that the defendant, entitled as he was to individual consideration, was to receive that consideration wholly apart from the crime which he had committed." *Id*. at ___, 111 S. Ct. at 2605. The conclusion reached in *Clemons*, 494 U.S. at ___, 110 S. Ct. at 1451, that a finding of harmless error was virtually foreclosed by the state's emphasis in closing argument on the "especially heinous" circumstance is, thus, inconsistent with *Barclay* and *Payne*.

[4] There is nothing in the Court's references to appellate review in *Stephens*, *Barclay*, or *Cartwright* that foreshadowed the rule of *Clemons*.

No precedent existing at the time of the *Clemons* decision compelled the conclusion that the individualized sentencing determination is rendered constitutionally infirm merely because the circumstances of the offense are characterized as "especially heinous, atrocious or cruel." To the contrary, the Court had on two prior occasions rejected the argument that an individualized sentencing determination was impermissibly skewed merely by the classification of otherwise valid sentencing concerns as an aggravating factor. *Barclay v. Florida*, 463 U.S. at 956; *see also Zant v. Stephens*, 462 U.S. at 889 (mere fact that some of the aggravating circumstances were improperly labeled "statutory" had an inconsequential impact on the jury's decision regarding the death penalty).

Further, prior precedent did not dictate the conclusion in *Clemons* that the concerns of *Lockett v. Ohio* and *Eddings v. Oklahoma* were implicated by Mississippi's application of an automatic affirmance rule because the rule deprived defendants of the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. The holding of *Lockett* and *Eddings* "that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial" relates to *what* evidence a jury must be permitted to consider not to *how* it must consider the evidence. *Saffle v. Parks*, 494 U.S.

at ___, 110 S. Ct. at 1261. Under Mississippi's capital sentencing proceeding, a jury weighs mitigating evidence against statutory aggravating factors found beyond a reasonable doubt. Despite the Court's reliance on *Lockett* and *Eddings*, the automatic affirmance rule does not affect *what* mitigating evidence is considered. Rather, by disregarding an invalid aggravating circumstance, the rule at most alters *how* the evidence is to be given effect. The rule of *Lockett* and *Eddings*, which is not concerned with *how* evidence is to be given effect, therefore cannot be construed as dictating the rule of *Clemons*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Respectfully submitted,

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